BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RACHEL HOLT	)	
Claimant	)	
VS.	)	
	)	Docket No. 163,562
NORTH AMERICAN PHILIPS LIGHTING	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INSURANCE	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Both claimant and respondent request review of the Award of Administrative Law Judge George R. Robertson, dated June 2, 1994.

APPEARANCES

Claimant appeared by her attorney, Jan L. Fisher of Topeka, Kansas. The respondent and its insurance carrier appeared by their attorney, C. Stanley Nelson of Salina, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Stephen Hilgers of McPherson, Kansas.

RECORD

The record considered by the Appeals Board is enumerated in the Award of the Administrative Law Judge.

STIPULATIONS

The stipulations of the parties are listed in the Award of the Administrative Law Judge and are adopted by the Appeals Board for this review.

ISSUES

The Administrative Law Judge found claimant entitled to permanent partial general body disability benefits based upon a fifteen percent (15%) permanent partial impairment of function for injuries to the right upper extremity and right shoulder. The Administrative Law Judge found the respondent provided accommodated employment to the claimant at a comparable wage. The claimant contends she has experienced injury to both upper extremities and is entitled to work disability. Claimant argues the job provided should not be considered as accommodated employment because she could neither physically perform it, nor was it a permanent, full-time position. On the other hand, respondent contends claimant has permanent impairment to the right arm only, despite surgery to the right shoulder and the alleged ongoing symptomatology in the left arm and left shoulder. Those are the issues now before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, claimant is entitled to benefits based upon a forty-eight percent (48%) permanent partial general disability as a result of the work-related injuries to her right upper extremity and both shoulders. Claimant's injuries occurred over an extended period of time as a result of mini-trauma due to repetitive work activities. The last day of that period, October 21, 1991, is designated as the date of the accident for purposes of computation of this Award.

(1) During the period of April 1990 through October 21, 1991, claimant experienced injury to her right upper extremity and both shoulders as a result of her work activities with the respondent. As a result of her repetitive work, claimant developed impingement in both shoulders; radial tunnel syndrome in the right elbow; a tear of cartilage in the right wrist; and, except for the left shoulder, underwent surgery for these conditions. Claimant's treating physician, board-eligible orthopedic surgeon James L. Gluck, M.D., established the relationship between claimant's injuries and her work for the respondent.

Although complaints of left shoulder problems do not appear in Dr. Gluck's office notes until April 1993, claimant testified at the Preliminary Hearing in April 1992 that she was having problems with the left shoulder, but they were nothing like those of the right. At this hearing, she also testified that another physician whom she had seen, Dr. Harbin, had told her she had abnormalities in both shoulders. Claimant testified she told Dr. Gluck about the symptoms in her left shoulder when she first saw him, but was told he wanted to treat the right shoulder first.

(2) Claimant's history of treatment of the right arm and shoulder is significant. Claimant testified she developed pain in her right shoulder, right arm and right wrist in 1988, approximately. At the time, she was repetitively lifting forty (40) pound boxes and handling four (4) foot long fluorescent bulbs while at work. Claimant sought treatment and was given a cortisone shot to the right shoulder. Pain in the right shoulder and the right elbow worsened by 1990, and claimant sought additional medical treatment and received another cortisone shot to the shoulder. In the spring of 1991, claimant was experiencing severe pain and received additional treatment from Dr. Harbin and Dr. Manguoglu. Thereafter, claimant came under the treatment of Dr. Gluck, who first saw her on October 17, 1991. Dr. Gluck immediately placed work restrictions on claimant which prevented her from working for the respondent. Dr. Gluck last saw claimant on October 27, 1993.

In early 1992, Dr. Gluck operated on the right shoulder to remove a bone spur, the front part of the acromion and a ligament that was pinching a tendon. In August of 1992, Dr. Gluck operated the right wrist to repair suspected torn cartilage. In January 1993, he operated the right elbow to decompress the radial nerve. As a result of her work-related injuries to the right upper extremity and both shoulders and using the AMA Guides, Dr. Gluck believes claimant has sustained a twelve percent (12%) permanent impairment of function to the body as a whole. The opinion of Dr. Gluck is persuasive and adopted by the Appeals Board.

In May 1993, Dr. Gluck placed permanent restrictions on claimant. Using a functional capacity evaluation as a baseline, Dr. Gluck released claimant to return to light work and indicated she could occasionally lift up to twenty (20) pounds and frequently lift ten (10) pounds or less. Additionally, she is restricted from frequent overhead lifting and sustained reaching activities. Although claimant can perform an occasional overhead lift up to ten (10) pounds, she is to restrict her pushing and pulling to no more than thirty (30) pounds on an occasional basis, or twenty (20) pounds or less on a frequent basis. Claimant may grasp up to forty (40) pounds on an occasional basis and up to twenty to twenty-five (20-25) pounds on a frequent basis. With those restrictions, claimant returned to work for respondent on July 5, 1993. Claimant was placed in the capsule room where she helped make small glass capsules filled with mercury. Claimant worked in this position until October 1993, when she retired with twenty-five (25) years of service. Although claimant took four (4) weeks of vacation and several days of personal leave during her final period of employment, she testified the job severely aggravated her symptoms. Although she dealt with the very lightest of weights, the heaviest being seventeen (17) pound steel lids on ovens, the job required one to work at a constant, brisk pace. In this job, claimant worked twelve (12) hour shifts, four (4) days one week and three (3) days the next week on an alternating basis. Although two (2) weeks of the four (4) weeks of vacation was due to plant shutdown, claimant testified she took the other days off because of the difficulties she was having with her job. Claimant admits she was considering retirement before her return to work in July 1993, but was convinced to retire as a result of her difficulties with her work. Because of increasing symptomatology, claimant returned to Dr. Gluck on August 25, 1993. His medical notes indicate the claimant's work activities were obviously exacerbating her symptoms. At this visit, Dr. Gluck prescribed additional anti-inflammatories and physical therapy and noted that, hopefully, he could keep claimant working until her retirement in early October.

Although claimant worked in the capsule room for the entire shift during her final period of employment, the job was not a full-time position and was filled only fifty percent (50%) of the time over the previous three (3) years. No explanation is provided regarding claimant's job duties for the remaining fifty percent (50%) of the time when claimant would not be needed in the capsule room.

An injured worker is entitled permanent partial general disability benefits for a nonscheduled injury under K.S.A. 1991 Supp. 44-510e, which provides in pertinent part:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than percentage of

> functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Based upon the above, and the uncontroverted testimony of Dr. Gluck that he did not feel the capsule room job was consistent with claimant's restrictions and his opinion the job was aggravating her symptoms, the Appeals Board finds claimant was unable to perform the accommodated work provided by respondent. Because the evidence regarding claimant's access to other jobs in the open labor market indicates claimant is unable to return to work and earn a comparable wage, the presumption of no work disability provided in K.S.A. 44-510e does not apply.

James Molski, a vocational rehabilitation expert, was the only expert witness to testify regarding the effect of claimant's injuries upon her abilities to perform work in the open labor market and to earn a comparable wage. Mr. Molski believes claimant has lost thirty to thirty-five percent (30-35%) of her ability to perform work in the open labor market using Dr. Gluck's restrictions and limitations. Mr. Molski also believes claimant's wage-earning potential in the open labor market is limited to $4.75 to $5.25 per hour. Based upon this testimony, the Appeals Board finds claimant has lost thirty percent (30%) of her ability to perform work in the open labor market and sixty-six percent (66%) of her ability to earn a comparable wage.

Although the Appeals Board is not required to equally weigh loss of access to the open labor market and loss of ability to earn a comparable wage, there is no compelling reason in this instance to give either factor greater weight. Therefore, the Appeals Board averages both losses and finds claimant has sustained a forty-eight percent (48%) permanent partial general disability in accordance with K.S.A. 1991 Supp. 44-510e.

While voluntary retirement may preclude recovery of temporary total disability benefits, it does not affect permanent partial general disability benefits. Temporary total benefits are a wage replacement. Permanent partial general disability, on the other hand, compensates injured workers for the loss of ability to earn comparable wages in the open labor market. See Brown v. City of Wichita, 17 Kan. App. 2d 72, 832 P.2d 365, rev. denied 251 Kan. 937 (1992).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson, entered in this proceeding on June 2, 1994, should be, and hereby is, modified:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Rachel Holt, and against the respondent, North American Philips Lighting, and its insurance carrier, Travelers Insurance, for an accidental injury which occurred on October 21, 1991, and based upon an average weekly wage of $611.19, for 72 weeks of temporary total disability compensation at the rate of $289 per week, or $20,808.00, followed by 343 weeks of permanent partial disability benefits at the rate of $195.59 per week or $67,087.37 for a 48% work disability, making a total award of $87,895.37.

As of March 13, 1995, there is due and owing claimant 72 weeks of temporary total disability compensation at the rate of $289.00 per week, or $20,808.00, followed by 105.14 weeks of permanent partial disability compensation at the rate of $195.59 per week in the sum of $20,564.33, for a total of $41,372.33 which is ordered paid in one lump sum, less any amounts previously paid. The remaining balance of $46,523.04 is to be paid for 237.86 weeks at the rate of $195.59 per week, until fully paid or further order of the Director.

The orders of the Administrative Law Judge that are not inconsistent with the above are hereby adopted by the Appeals Board as its own pertaining to payment of medical expense, approval of attorney fee and payment of administration expenses.

Future medical expense will be considered upon proper application to the Director.

IT IS SO ORDERED.

Dated this ____ day of March, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jan L. Fisher, Topeka, KS
C. Stanley Nelson, Salina, KS
Stephen Hilgers, McPherson, KS
George R. Robertson, Administrative Law Judge
George Gomez, Director